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purchaser in the shoes and subjects him to the equities (if any) against the assignor thereof: *McJilton v. Love*, 13 Ill. 495, and cases cited; *Cook & Sargent v. Burtis*, 16 Iowa 194; *Ballinger v. Tarbell*, Id. 491; *Crocker v. Isett*, 18 Id. Why should a purchase under it have any greater effect?

But the doctrine that the judgment is a nullity should be strictly limited to cases where there has been no service, and where there is a total want of *jurisdiction* in the court, and a total want of authority on the part of the attorney to appear. It should not be extended to cases where an attorney, who has been retained or regularly employed, has simply *exceeded* his authority.

J. F. D.

RECENT AMERICAN DECISIONS.

Court of Appeals of Maryland.

THE STATE OF MARYLAND, TO THE USE OF MARY COUGHLAN,
v. THE BALTIMORE AND OHIO RAILROAD COMPANY.

THE BALTIMORE AND OHIO RAILROAD COMPANY v. THE STATE
OF MARYLAND, TO THE USE OF MARY COUGHLAN.

Distinction between Passengers and Strangers.—Railway companies owe a higher degree of watchfulness and care to those sustaining the relation of passengers, than to mere strangers having no fiduciary relations with the company.

Distinction further defined.—In the former case the utmost care and skill is required, in order to avoid injuries; but in the latter case, only such as skilful, prudent, and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth.

Negligence of Plaintiff.—The plaintiff cannot recover for an injury resulting from the negligence of the defendant, if, notwithstanding such negligence, he might have avoided the injury by the exercise of care and prudence on his part, or if his own want of such care and prudence or that of the party injured, in any way contributed directly to the injury.

Damages.—In a case where the mother is to be compensated for the injury or loss consequent upon the death of her infant child, the shock or suffering of feelings is not to be taken into the account, but only the pecuniary loss, and that is not to be extended beyond the minority of the child.

THE Baltimore and Ohio Railroad Company were the owners of a track on Locust Point, in the City of Baltimore, and used a locomotive for the regulation of the trains, picking up empty cars and uniting them to be sent out on the main track. On the occa-

sion in question, a train had been formed in this manner, consisting of many cars, and was being backed at a very slow speed round a curve, on which were houses that prevented the engine-man from seeing the back of the train or the end car. Two boys, playing in the neighborhood, who saw the train in motion, ran to get a ride on the last car, catching hold of the bumper and with their feet on the brake bar. A jolt threw one off and he was killed, while the other was badly injured, losing a part of one hand. It was in proof that these boys had again and again been driven from the cars on other occasions, and their parents informed of their conduct. It was admitted that there was no employee of the company on the end car, and that the engineman and conductor did not know of the accident till some time after it happened.

The opinion of the court was delivered by

BOWIE, C. J.—These are cross-appeals in an action instituted under the 1st and 2d sections of Article 65 of the Code, by the state for the use of a widowed mother, whose son was killed under the circumstances detailed in the bill of exceptions.

After evidence was offered by both parties, a series of prayers was submitted by each, all of which were rejected and other instructions given by the court instead thereof.

To which rejection, and the instructions given, the plaintiffs and defendants severally excepted.

The counsel of the defendants having filed in these causes a declaration in writing, that, in the event of an affirmance of the judgment as against the plaintiffs on their appeal in the first case, the defendants will abandon their exceptions, it is proper first to inquire whether the appellants have been aggrieved by the action of the court below.

The General Assembly of this state in the year 1852, finding the common-law maxim, "Personal actions die with the person," unsuited to the circumstances and condition of the people, enacted a law entitled "An act to compensate the families of persons killed by the wrongful act, neglect, or default of another person." To make its design more obvious, the fourth section provides, "the word person shall apply to bodies politic and corporate," and "all corporations shall be responsible, under this act, for the wrongful acts, neglect, or default of all agents employed by them."

The material provisions of this act, as well as its title, are derived from the 9th and 10th Victoria, and are embodied in Art. 65 (tit. *Negligence*) of the code.

The object of the several series of prayers was: 1st. To furnish the jury with a standard of the care and diligence, required by law of the defendants, to exempt them from liability for damages for the injury incurred; 2d. To prescribe the care necessary to be exercised by the deceased to entitle his next of kin to recover; 3d. To define the measure of damages.

The appellant's first prayer required the defendants, under the circumstances therein predicated, "to exercise the *utmost care and diligence* to prevent accidents endangering the life or lives of the people or inhabitants of the said city."

The second held, that the defendants were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and if the use of a guard, or look-out, at the head or in the rear of said cars * * * was a measure by which such accidents would probably be avoided, the omission was culpable negligence.

The appellant's third prayer affirms that the jury, in the estimate of damages, should take into consideration the expense to which the plaintiff was subjected in consequence of the accident, and the loss resulting therefrom, not only to the present time, but also the probable prospective loss and expense, &c., and that, in estimating the said loss and damage, the jury are not limited to the actual pecuniary loss proved in said case.

The propositions laid down by the court, in the first instruction granted, are:—

That the defendants, in the movement and management of their cars and engines, were bound to exercise the *utmost care and diligence* which it was within their means and power to employ, to prevent accidents, and injuring or endangering the life or lives of the people; and if the jury find that the child of the plaintiff's *cestui que use* was run over and killed by the defendants' cars, as described by the witnesses, and that, if the defendants, in the use and management of their cars and engines, had exercised the *highest degree of care and diligence* "which it was within their means and power to employ," the said accident could have been prevented, then the plaintiff is entitled to recover in the action: but although the jury may find that the said accident could have

been prevented by the use of such care and diligence on the part of the defendants, yet the plaintiff is not entitled to recover if the jury believe the accident could have been avoided by the exercise of that degree of care, by the said child, which was, under all the circumstances, to be naturally and reasonably expected from one of said boy's age and intelligence.

The degree of care and diligence imposed by law on the defendants, in the instruction given by the court, is as high as that required by the appellant's prayers; the degree is the "utmost care and diligence," the "highest it was within their means and power to employ;" the only material difference is, that one of the appellant's prayers asked the court to instruct the jury specifically, "that if the use of a guard or look-out, at the head or in the rear of said cars, was a measure by which such accidents would probably be avoided, the omission was culpable negligence." The general terms used by the court embraced all the particulars specified by the prayer of the appellant, qualified by the words, "it was within their means and power to employ."

The jury were at liberty to find, under the instruction given, and perhaps did find, that the absence of the guard constituted the want of the "highest care and diligence within the means and power of the defendants," and therefore rendered their verdict in favor of the plaintiff.

The liability of the defendants in this case did not depend upon their obligations as carriers of passengers, in which character they are bound "to use the utmost care and diligence which human foresight can use:" *Stockton v. Frey*, 4 G. 422-23; *Worthington v. Baltimore and Ohio Railroad Co.* (in this court, not yet reported). But their liability, if any, arises upon a statute which limits the action to such wrongful act, neglect, or default, "as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof:" Vide Code, art. 65, § 1.

The party injured not being a passenger, the defendants were not required to exercise that degree of vigilance which the law required towards those with whom there is a relation of trust and confidence, or bailment between the parties. "Towards the one, the liability of the latter springs from a contract express or implied, and upheld by an adequate consideration. Towards the other, he is under no obligation but that of justice and humanity.

While engaged in their lawful business, both are bound to use a degree of caution suited to the exigencies of the case:" 8 Barb. 378.

In an analogous case, this court said: Railroad companies should use "such care and diligence in using the locomotive upon the road, as would be exercised by skilful, prudent, and discreet persons, having the control and management of the engine, regarding their duty to the company, the demands of the public, and the interests of those having property, and having a proper desire to avoid injuring property along the road." This was said in a case of injury to property, but is cited with approbation by Redfield as applicable to persons: Redfield on Railways 345, 4 Md. 257.

The court's instruction did not close with the definition of the degree of care and diligence on the part of defendants; but proceeded to inform the jury, although the accident could have been prevented by the exercise of such care and diligence by the defendants, yet the plaintiff is not entitled to recover, if the jury believe the accident could have been avoided by the exercise of such care by the child as might, under all the circumstances, have been reasonably expected from one of his age and intelligence. In other words, if there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although, by the exercise of extraordinary care on their part, the accident might have been prevented.

This ruling is in conformity with all the text-writers, and the great majority of adjudged cases: Redfield on Railways 337; 2 Car. & R. 730; 8 C. B. 115.

It is objected on the part of the plaintiff below, the appellant in this case, that the court's first instruction was erroneous, in instructing the jury, the action could not be maintained "if the jury believed the accident could have been avoided by the *exercise of that degree of care by the said* child, which was, under all the circumstances, to be naturally and reasonably expected from one of his age and intelligence." Whereas the court should have told the jury the plaintiffs could not recover, if the jury found "there was a want of that degree of care on the part of the said child which, under the circumstances, was naturally and reasonably to be expected in one of his age and intelligence." The question of the "*want of,*" or *absence* of such care, should have been left

to the jury rather than the exercise of such care. It is difficult, if not impossible, to perceive the difference between the two propositions. In the court's instructions the proposition is stated affirmatively; in the appellant's objection it is negatively. The jury were to find whether there was or was not due care on the part of the deceased. They are told by the court, "if they believed the accident could have been avoided by the *exercise* of that degree of care," &c., the plaintiff could not recover. The appellant insists that, not the exercise, but the want of care (which is the non-exercise of care), is the criterion. The principle of the common law, that a plaintiff cannot recover for injuries to which his own negligence directly contributed, is admitted, and it seems to us it was clearly expressed by the court in the instruction given, as far as the conduct of the deceased child was concerned. In the case of *The Baltimore and Ohio Railroad Co. v. Lamborn*, 12 Md. 261, and *Keech's Case*, 17 Id. 46, the rule of the common law, that the plaintiff could not recover for injuries to which his own negligence directly contributed, was held to apply to actions brought on the statutes therein referred to, and the instructions, affirmed by the court in those cases, submitted to the jury the question of negligence on the part of the plaintiff, as well as on the part of the defendant.

The same policy would require the plaintiff to show, in actions for injuries resulting in death, that neither the party injured, nor the parties for whose use the action was brought, had contributed, by neglect or want of care, to the calamity complained of. This omission in the instruction given enured to the advantage of the appellant, and cannot be taken advantage of on her appeal.

The objection raised by the plaintiff to the court's second instruction, involves the measure of damages. In the language of the brief, "it was erroneous, 1st. Because it ignores the mental sufferings of the mother suing for damages sustained by the loss of the child, and confines her claim to pecuniary damages." 2d. Because it limits the pecuniary loss of the mother, the *cestui que use*, "to the minority of the child, and deprives the jury of the right to award her damages for the pecuniary loss she would reasonably sustain, in her advanced life, for want of the labor and services of the son, even after he reached his majority. The rule should have been to allow what they considered a reasonable compensation."

In the absence of any interpretation of this act by our own courts, we must compare and weigh the reasoning of the authorities cited, in which similar acts have been construed by other tribunals.

First in order are the decisions in England upon the act called Lord Campbell's Act, 1 Redfield 336. The observations of COLERIDGE, J., in the case of *Blake, Adm'r., v. The Midland Railway*, 10 Eng. L. & E. R. 487, cited by Redfield in his notes, are very strong in support of the instructions given by the court below in this case, confining the jury to the pecuniary damage sustained by the plaintiff. He says: "Our only safe course is to look at the language the legislature has employed. The title of the act is for compensating families of persons, &c., not for solacing their wounded feelings." * * * By the terms of the act, quoting the second section, "the measure of damages is not the loss or suffering of the deceased, but the injury, resulting from his death, to his family." This language seems more appropriate to a loss of which some estimate may be made, than an indefinite sum, independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly tends to the same conclusion.

As we have before intimated, the title and language of the Act of Assembly of this state are almost literally the same with those of the English statute.

The former contains, also, the provisions for distributing the damages among the surviving members of the deceased family, on which the learned judge relies for adopting the principle of *compensation* for damages which may be estimated in money.

The American cases, arising upon acts varying in language, necessarily lead, as observed by Judge Redfield, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors.

It is assumed by the learned author just mentioned, as the conclusion of the best considered cases in this country, that mental anguish, which is the natural result of the injury, may be taken into the estimate of the damages to the party injured.

The connection in which this assumption is made, might lead to the inference that it applied to actions brought by *survivors*, for injuries done to their deceased ancestor, relative, or next of kin;

but upon reference to the authorities cited, it will be found that the plaintiffs in those cases were the persons sustaining the bodily harm, and in estimating their damages their mental suffering constituted an element of compensation: 1 Cush. 451; 10 Barb. 623.

To have instructed the jury to allow "what they considered a reasonable compensation," would, in the language of the Supreme Court of Pennsylvania, "be giving the jury discretionary power, without stint or limit, highly dangerous to the rights of the defendant, and leaving them without any rule whatever:" *Rose v. Story*, 1 Barr 190, 197. In the case of the *Pennsylvania Railroad Co. v. Kelly*, 7 Casey 372, the same learned court say:

"Generally speaking, the influence of the court, in this class of cases, should be exerted to restrain those excesses into which juries are apt to run. * * * Wild verdicts are frequently rendered. And the tendency, in modern times, undoubtedly is to excessive damages, especially where they are to be assessed against corporations:" Ibid. 379; *The Pennsylvania Railroad Co. v. Zebe et ux.*, 33 Penna. 330.

The last objection to the second instruction granted, is that it limits the mother to compensation for loss of her son during his minority only.

To submit to a jury the value of a life, without limit as to years, would have been to leave them to speculate upon its duration without any basis of calculation.

The law entitles the mother to the services of her child, during his minority only (the father being dead); beyond this, the chances of survivorship, his ability or willingness to support her, are matters of conjecture too vague to enter into an estimate of damages merely compensatory. According to the appellant's theory, the mother and son are supposed to live on together to an indefinite age; the one craving for sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are inestimable moral examples, beautiful to contemplate, but the law has no standard by which to measure their loss.

This court, being of opinion that the several instructions granted by the court below were as favorable to the plaintiff (the appellant) as she was entitled to, and that she was not prejudiced by the rejection of the prayers submitted on her part, finds no error in

the rulings of the court below, in the first appeal, and will affirm the judgment.

Judgment affirmed.

The first proposition maintained in this case is very obvious upon principle as well as the decided cases. Where such an amount of passenger traffic as is now done by railways is confided to agents operating by means of so powerful and dangerous an element as steam, no state or country could fairly justify any rule of responsibility except that of the utmost practicable watchfulness, skill, and ability. And no doubt these considerations, connected with the nature and extent of the business of railways, will justify a demand that their business shall be so conducted as to give fair and just opportunity for the conduct of other legitimate business, more or less interfering with that of the company, with reasonable security. The rule, as stated in some of the earlier cases, in regard to railways, is that they should be so conducted, with reference to other business interests, that all may have proper scope and reasonable opportunity to escape detriment; the same as if the company owned both interests, and desired the success of both: *Quimby v. Vermont Central Railway Co.*, 23 Vt. Rep. 387. This rule, as we have often attempted to show, will apply with great stringency to any business which is more than commonly liable to destroy life or property. Prudent men always measure their care and diligence by the exigencies of the business and the occasion. Hence it was held in an early case in California (*Wilson v. Cunningham*, 3 Cal. Rep. 241), that where the track of a railway intersects the thoroughfares of a city the company are bound to exercise extraordinary care not to injure persons in the streets.

Accordingly, in the present case, it is probably true, as suggested by the court,

that where a company push a train of cars backwards through the streets of a city, they would be bound to have a servant so stationed that he could look out for persons or property exposed to injury, and who could either himself stop the train or give signal to some one for that purpose in time to prevent collision and damage. But this is not a question of law altogether, and would ordinarily have to be passed upon by the jury. We have discussed this general question of diligence and negligence, both as to the principles involved and the cases bearing upon it, in *Taylor v. Briggs*, 28 Vt. Rep. 180, more in detail than would be proper here.

In regard to the effect of general negligence in the party to whom the injury occurs, remotely exposing him to the injury, but forming no part of the proximate cause of the same, the cases are numerous, and at the present day reasonably concurrent in the result, that unless the want of due care on the part of the party injured or of those responsible for the conduct of such party contributed directly to the production of the injury, the other party will be responsible, provided his negligence was the efficient cause of the injury and, with the exercise of proper care, he might have avoided inflicting it, notwithstanding the general want of proper watchfulness by the party injured. The cases are too numerous upon this point to be quoted in detail. *Davies v. Mann*, 10 M. & W. 546; *Illidge v. Goodwin*, 5 C. & P. 190, are the leading English cases. The American cases will be found, in almost all the states, to have maintained the same view. *Trow v. Vermont Central Railway Co.*, 24 Vt. Rep. 487; *Isbell v. N. Y. & N. H. R. R. Co.*, 27

Conn. Rep. 393; *Kerwacker v. C. C. & C. R. R. Co.*, 3 Ohio (N. S.) 172; *C. C. & C. R. R. Co. v. Elliott*, 4 Id. 474. The rule is very broadly stated in *New Haven Steamboat & Transportation Co. v. Vanderbilt*, 16 Conn. Rep. 421.

And it seems that the fact that the person or property, as cattle, are trespassing at the time the injury occurs will not subject them to damage without redress, provided there is no such wrong on the part of the person, or of the owner of the property, as to contribute directly to the injury, so that the other party might not, with ordinary care, have avoided it: *Isbell v. N. Y. & N. H. R. R. Co.*, *supra*; *Daley v. Norwich & Worcester R. R. Co.*, 26 Conn. Rep. 591; *Brown v. Lynn*, 31 Penn. St. Rep. 510; *C. C. & C. R. R. Co. v. Terry*, 8 Ohio (N. S.) 570.

But where the negligence of the party injured, in any manner or to any extent, contributed directly to the production of the injury, however slightly, there can be no recovery: *Witherly v. Regent's Canal Company*, 12 C. B. N. S. 2; s. c. 3 F. & F. 61. So in a very late English case, where the party finding the gates at a crossing negligently closed in the night time, after every exertion to find some servant of the company to open them, necessarily opened the gates himself in order to pursue his journey, and where, without any fault on his part, the gate swung back by its own weight and struck the horse which became unmanageable, whereby the plaintiff was thrown out of the carriage and injured, it was held he could not recover, inasmuch as he had no right to open the gates himself, and the injury was produced by his own wrongful act in doing so: *Wyatt v. Great Western Railway Co.*, 11 Jur. (N. S.) 825.

The question of damages is one in regard to which, for a time, the cases seemed to vacillate somewhat, upon the

point whether the manner of the infliction of the injury and the shock to the feelings of those near relatives for whose benefit the action was brought, could be taken into the account. It seems very clear that where the suit is for the benefit of the very person sustaining the injury, there could be no question that any shock or injury to his feelings, any mental suffering, which was the direct consequence of the injury, should be considered in estimating damages. Such suffering is a part of the necessary labor to be borne by the party injured, in consequence of the injury: *Canning v. Williamstown*, 1 Cush. 451; *Morse v. Auburn & Syr. Railway Co.*, 10 Barb. 621. But in estimating damages to other parties, affected incidentally by the death of the party injured, it seems now pretty generally conceded, that no account of wounded feelings can be taken. And this, upon the whole, seems but just and reasonable. For there would be no uniformity in cases of this kind if the jury were allowed to go into considerations so remote and uncertain: *Penn. Railway Co. v. McCloskey*, 23 Penn. St. Rep. 526, 528, where it is said, "The jury must place a money value upon the life of a fellow-being, very much as they would upon his health or reputation." And the same rule is followed in *Oakland Railway Co. v. Fielding*, 48 Penn. St. Rep. 320. So in *North Penn. Railroad Co. v. Robinson*, 44 Penn. St. Rep. 175, it is said, the value of the life lost, estimated by a pecuniary standard, is what is to be recovered.

There is one qualification in regard to the extent to which damages were allowed to be given by the jury in the principal case, which has not generally been adverted to, and which seems to us somewhat liable to misconstruction. We refer to the restriction limiting prospective damages to the minority of the child. It has been decided that a father may re-

cover pecuniary damages for the death of a son twenty-seven years of age, unmarried, and who had been accustomed to make occasional presents to his parents: *Dalton v. South Eastern Railway Co.*, 4 C. B. N. S. 296. And it was here held, as it has often been in other cases, that the jury could not give damages by way of compensating the father for the expenses of his son's funeral or for procuring family mourning. So also *Franklin v. South Eastern Railway Co.*, 3 H. & N. 211; *Blake v. Midland Railway Co.*, 18 Q. B. 93. It was lately held in the Exchequer Chamber (*Pym v. Great Northern Railway Co.*, 10 Jur., N. S. 199) that where, in consequence of the

death of the father, his income was by direction of his will unequally distributed among his widow and children, the eldest son taking most of it, that damages might be recovered for the benefit of the whole class on that ground, some of the children being thereby deprived of an expected support had the life of the father continued. In the very late English case of *Bonter v. Webster*, 13 W. R. 289, the Court of Queen's Bench adhered to the rule that no damages could be awarded to the parent by reason of the death of his child, on account of the expenses of the funeral.

I. F. R.

Court of Common Pleas of New York.

NEW YORK, ALBANY, AND BUFFALO TELEGRAPH COMPANY v. DE RUTTE.

Where a telegraph company receives a message addressed to a place beyond its route; and takes the compensation for the entire distance, it engages for the due delivery of the message at its destination, unless it expressly limits its responsibility to its own route, or the circumstances are such as to clearly indicate that such was the understanding of the contracting parties.

The receiver of the message is entitled to sue for his loss by the company's negligence.

The same general principles apply to the liabilities of telegraph companies as to common carriers, but not invariably nor to the same extent. Per DALY, J.

A telegraph company has a right to limit its liability by requiring a message to be repeated, but knowledge of this requirement must be brought home to the sender.

Where a person received a telegram in which there were several errors, all but one of which, however, he interpreted correctly, and that one was not apparent on its face, it is not such negligence in him not to have the message repeated, as will prevent his recovery for loss incurred in consequence of the undiscovered error.

Where a party receiving a telegram erroneously directing him to purchase wheat at 25 francs instead of 22 francs as the message should have been, purchases a quantity of wheat which he is obliged to resell at a lower price, the loss is such a direct result of the negligence as will entitle him to recover.

The Act of 1848 in regard to telegraph companies and messages, is intended as much for the protection of the companies against combinations and monopolies among themselves, as for the public. Per DALY, J.